Supreme Court, U. S.
FILED
DEC 6 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-805

CALVIN C. FRANKLIN,

Petitioner,

versus

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

CALVIN C. FRANKLIN,
Petitioner,

versus

THE STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF GEORGIA

OPINIONS IN THE COURTS BELOW

The Order of the Superior Court overruling Petitioner's Motion to Suppress and the opinion of the Georgia Court of Appeals (with dissent), which was reported at 143 Ga. App. 3 (____SE2d ____) are set out in full in the appendices hereto.

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION

The Judgment of the Georgia Court of Appeals was entered on July 1, 1977 and a rehearing denied on July 19, 1977. The Supreme Court of Georgia denied Petitioner's Application for Writ of Certiorari on

September 8, 1977 with two Justices dissenting and one not participating. Motion for Reconsideration was denied on September 27, 1977. Jurisdiction of this Court is invoked pursuant to 28 USC §1257(3).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the blocking of petitioner's aircraft and the subsequent ordering of petitioner from his aircraft by police officers with drawn arms constitutes an "arrest" and, as such, requires probable cause to establish its constitutional validity.

(2) Whether an investigatory stop of an individual is authorized only when the arresting police officers or his superiors have an articulable suspicion with respect to such individual that dictates a limited seizure of such individual for only a brief and reasonable length of time in order to ascertain from such individual certain information pursuant to and in connection with their articulable suspicions.

(3) Whether an articulable suspicion sufficient to authorize an investigatory stop must be known to the police officers who are actually making the investigatory stop, or otherwise the traditional showing of probable cause should be required.

(4) Whether a search incident to a seizure of petitioner, based on less than probable cause, may be upheld when the arresting police officers were relying on a non-police message from another state requesting the arresting police to hold an aircraft without any explanation of the causes or underlying circumstances of such request.

(5) Whether a constitutional investigatory stop necessarily entails as its objective, an attempt by the police officers making the stop to obtain information pursuant to questions which they have already formulated pursuant to their articulable suspicions; i.e., must the police officers know what they intend to investigate at the moment they seize an individual if the investigatory stop is to be held valid.

THE CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Amendment IV to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Code §27-707 (Arrest without Warrant):

An arrest for a crime may be made by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape or for other cause there is likely to be failure of justice for want of an officer to issue a warrant.

Georgia Code §27-301 (Search without Warrant):

When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of:

(a) Protecting the officer from attack; or
(b) Preventing the person from escaping; or
(c) Discovering or seizing the fruits of the crime for which the person has been arrested; or
(d) Discovering or seizing any instruments, articles, or things which are being used, or which may have been used, in the commission of the crime for which the person has been arrested: Provided, however, when the peace officer is in the process of effecting a lawful search, nothing in this action shall be construed as precluding him from discover-

ing or seizing any stolen or embezzled property, any item, substance, object thing or matter the possession of which is unlawful, or any item, substance, object, thing or matter other than the private papers of any person which is tangible evidence of the commission of a crime against the laws of the State of Georgia. (Acts 1966, p. 567)

CONCISE STATEMENT OF THE CASE

On the day and night of June 19-20, 1976, petitioner was the pilot of an executive transport-type aircraft (Lockheed Learstar) with its destination being Atlanta, Georgia. Due to extremely bad weather resulting in the failure of all major navigational instruments of the aircraft, petitioner became lost and eventually landed at a lighted airport which turned out to be at Anniston-Oxford, Alabama. Upon landing, the police were notified by an FAA traffic control specialist and told that the subject plane had "landed without authorization" (the aircraft's arrival was unannounced since its radios were not working, and even had they been, they would not have known what frequency to use since the pilot did not know where he was) and three Anniston, Alabama police officers responded to the call.

The only passenger alighted from the aircraft to meet with the three police officers and informed them that he and petitioner (pilot) were destined for Atlanta, Georgia and had become lost due to the bad weather. After inquiring as to his present whereabouts, and being supplied the information requested by the Alabama police officers, the passenger re-boarded the

plane unimpeded. As the aircraft's engines started, apparently one police officer attempted to detain it but could not effectively get the attention of either petitioner or the passenger as the aircraft noisily taxied down the runway. It should be noted that these police officers were responding to a report of a suspected "unauthorized landing" which, without dispute from the State, is neither a crime nor a violation of any FAA regulation, as no authorization was needed to land at the airport in question. No radio call was, in fact, required — it is "usual", but not required.

In some way, *other than* through the police authorities, but probably through FAA channels, a message was relayed to Fulton County, Georgia police to hold the aircraft for "authorities" in Alabama. *No description* of the aircraft or its occupants was given *nor any explanation as to why the Alabama authorities wanted the aircraft held.* No charges were made against the aircraft or its occupants and all witnesses admit that no illegal conduct of any sort was observed by them with respect to either the aircraft or its occupants.

Petitioner landed the aircraft at the Fulton County, Georgia airport and as he was taxiing towards the terminal, two Fulton County police cars and one airport security car blocked the taxiway. Petitioner, having no other choice, stopped his engines and asked from the cockpit to be allowed to taxi on to the terminal. The Fulton County police officers, armed with shotguns, ignored petitioner's request and ordered him out of the aircraft immediately with his hands up. Petitioner disembarked and was immediately searched while leaning against the aircraft and was then led to the back of

a police car and *locked* in. Subsequently the police found the subject marijuana on the aircraft. Petitioner was charged and indicted for possession of more than one ounce of marijuana with intent to distribute same in violation of the Georgia Controlled Substances Act. Prior to trial, on September 30, 1976, petitioner filed his "Motion to Suppress" all evidence obtained from the search incident to the unlawful arrest.

The evidence from said hearing reveals that *no warrant* for the arrest and/or search of petitioner and the subject aircraft had been issued. The arresting police had *no identification* of the subject aircraft or its occupants and the aircraft piloted by petitioner apparently just happened to be the next aircraft to land at Fulton County airport after the police arrived at the airport. In fact, the police were informed that the aircraft requested to be held had already landed at the airport. *No offense* of any type was committed in the presence of the arresting officers prior to the arrest, *nor had the arresting officers been informed that either petitioner or the subject aircraft had committed any type of offense.* The arresting officers were simply asked to hold the subject aircraft and petitioner for Alabama "authorities". In fact, there is no evidence from the record that the initial call to the Fulton County police had come from the police authorities in Alabama and it appears that the call was made by and through the FAA.

At the hearing on the Motion to Suppress, the arresting officers *admitted* that they did not know who they were to hold, or why they were to hold them — even admitting it could have been because someone on board had a sick child in Alabama.

Petitioner's Motion to Suppress was denied on November 10, 1976 and he instituted an interlocutory appeal to the Court of Appeals of Georgia.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner filed a Motion to Suppress contending that the evidence against him (the contraband) was seized in violation of his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States. Said Motion was denied on November 10, 1976 and petitioner promptly filed an interlocutory appeal to the Court of Appeals of Georgia. The Court of Appeals (two judges dissenting) affirmed the ruling of the trial court.

REASONS FOR GRANTING THE WRIT

A. It Should Be Made Clear That An Arrest Occurs At The Moment One Is Ordered From His Vehicle At Gunpoint.

Traditionally, an arrest is effected whenever the liberty of another is restrained. As stated in numerous earlier decisions in Georgia: "An arrest is accomplished whenever the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be. The defendant may voluntarily submit to being considered under arrest without any actual touching or show of force, and the arrest is complete. [Cits.] The mere fact that the officer testifying with regard to these occurrences stated at one place in his testimony that after he had completed search, he then 'placed him under arrest' does not alter the fact that the defendant was actually under arrest

from the moment the police officers approached the automobile which he was driving and caused him to alight therefrom under the force and restraint of drawn guns." *Clements vs. State*, 226 Ga. 66, 67 (172 SE2d 600); *Strong vs. State*, 231 Ga. 514, 518 (188 SE2d 879); *Brooks vs. State*, 129 Ga. App. 109, 110 (198 SE2d 892); *Rogers vs. State*, 131 Ga. App. 136 (205 SE2d 473); *Hill vs. State*, 140 Ga. App. 121 (230 SE2d 236).

It is respectfully submitted that petitioner was under "arrest" at the very moment the police first forcefully and seriously interrupted his liberty — and that occurred when they blocked his aircraft and with weapons drawn, ordered petitioner from his cockpit. *Henry vs. U.S.*, 311 U.S. 99, 103 (1959). Consistent with this position is *U.S. vs. Strickler*, 490 F.2d 378 (9th Cir. 1974), where it was held that the conduct of the police in approaching a vehicle, armed with a gun and encircling the vehicle in question, constituted an arrest and thus probable cause was needed. The restriction of one's "liberty of movement" was complete, the Ninth Circuit said, when the defendant was encircled by police and confronted with official orders at gunpoint. See *Rios vs. U.S.*, 364 U.S. 253 (1960); *Henry vs. U.S.*, supra. Traditionally, the Appellate Court of Georgia, to which petitioner seeks certiorari, had consistently held that "whenever a police officer accosts a person or restrains his freedom to walk away, he has seized that person." *Holtzendorf vs. State*, 125 Ga. App. 747, 749 (188 SE2d 879). The decision below "changes" what had been well settled law due to, it is believed, erroneous interpretation of this Supreme Court's decision in *Terry vs. Ohio*, 392 U.S. 1 (1968), and the failure of this Court in *Beck vs. Ohio*, 379 U.S. 89 to establish at just what point an arrest is made. After a review of the ample authority it is apparent that

proper constitutional construction, it is submitted, should have demanded a finding, as a matter of constitutional right, that petitioner was under arrest when his liberty was restrained in the manner here used.

This Court should now fill the gap left by *Beck vs. Ohio*, supra, by squarely deciding, as did the Ninth Circuit in *U.S. vs. Strickler*, supra, that the ordering of one from his vehicle at gun point is an arrest — at that moment.

B. This Court Should Clarify The Distinction Between A "Terry Stop" And An Arrest

Since this arrest (as petitioner contends it was) was without an arrest warrant, its validity necessarily rests on a finding of probable cause at the moment petitioner's liberty was in fact restrained. To determine the presence or absence of probable cause to arrest, one must consider the totality of the circumstances surrounding the arrest. As the Supreme Court stated in *Beck vs. Ohio*, 379 U.S. 89 (1964):

> "Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it — whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that petitioner had committed or was committing an offense." See also *U.S. vs. Bowers*, 458 F.2d 1045 (5th Cir.).

In light of this analysis, the officers were clearly without probable cause. Here, there was no arrest warrant. Nor was there any offense committed during the observation of the aircraft. There was no offense in the officer's presence nor attempts to escape. The arresting officers were not even told of any offense, actual or suspected. Even the trial judge agreed that there was no probable cause such as would have supported the issuance of a warrant (Tr. 64). As stated by the appellate court in this case, "Because probable cause for an arrest did not exist until the marijuana was actually spotted inside the plane, we must determine whether sufficient evidence existed for a determination by the trial judge that the defendant's initial confrontation with the police was in the context of a Terry stop." *Franklin vs. State*, 143 Ga. App. 3, 4, ___ SE2d ___ (1977).

Certainly one of our most jealously guarded rights is the right to be free from unreasonable searches and seizures as provided for in the fourth and fourteenth amendments to the Constitution of the United States. *The question of when a Terry stop ends and an arrest begins is one that has arisen often, but unfortunately, with divergent and inconsistent results.* By virtue of the great danger that the Terry stop will be used as a guise for warrantless searches and seizures, careful judicial safeguards should be exacted. As stated in *U.S. vs. Ramos-Zaragosa*, 516 F.2d 141, 144-145 (9th Cir., 1975):

> "The line between evidence seized pursuant to an unlawful arrest which must be suppressed

> . . . and evidence seized on the basis of probable cause which developed concurrently with the reasonably brief investigatory stop . . . is a difficult one to draw and follow."

Central to the resolution of the issue presented by the case at bar is a determination of what requirements are needed in order to have a valid Terry stop. It is (or was until recent years) clear that the Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis vs. Mississippi*, 394 U.S. 721 (1968).

This Court has noted that without judicial standards the Terry stop could potentially lead to unlimited interference by police. Consequently, in *U.S. vs. Brignoni-Ponce*, 422 U.S. 873 (1975), it was held that in order to justify an investigative search with less than probable cause existing, the officer in question must be *aware* of *specific articulable facts* arising from his personal observation and which reasonably warrant suspicion that a crime has been or is about to be committed. Also, if a Terry stop may be used "to maintain the status quo", its validity must be judged by the facts *known to the officer at the time of the stop. Adams vs. Williams*, 407 U.S. 143 (1972). In Terry terms, the officer must be able to point to specific and articulable facts and our concern is to determine what the record shows the officer knew on the scene at the time of the Terry stop. *U.S. vs. Tharpe*, 536 F.2d 298 (5th Cir. 1976).

Turning to the case *sub judice*, it is quite apparent that the encounter with the petitioner by the arresting

police officers was based merely on, at most, a naked suspicion without any supportive facts. In fact, the arresting officers had no idea what the crew of the subject plane was suspected of (Tr. 41-42) and yet they had pre-determined that they were going to hold the pilot *regardless* of what their investigation revealed (Tr. 49). It is rather paradoxical to hold that the surrounding of petitioner's aircraft by the police was not an arrest, but rather an investigative stop in light of the fact that the officers had no idea of what conduct they were investigating; and regardless of what was actually revealed by their stop, the police, by their own testimony (Tr. 49), had a fixed intention of holding the subject plane along with petitioner "for the Alabama authorities". Since the police in question had no idea why they were "investigating" the subject airplane, it is urged that by definition it was impossible to have a valid Terry stop. It is respectfully submitted that in order to "investigate" there must be something specific sought; and to have a "reasonable suspicion" certainly means, at least, that one knows what he is suspicious of. As stated in *U.S. vs. Tharpe*, 536 F.2d 298 (5th Cir., 1976), "judicial analysis of a purported Terry search must focus on the facts known to the officer on the scene of the encounter and the emphasis of risk of danger reasonably drawn from the totality of those specific circumstances".

It is respectfully submitted that this Court should now hold that a bare radio message to "hold" an aircraft, with no reason given, is *not* an "articulable suspicion" sufficient to authorize an investigatory stop, much less a shotgun-point arrest.

C. This Court Should Hold That A "Suspicion" Of Having Committed A Regulatory Offense In One State Cannot Form The Probable Cause Needed For An Arrest Without A Warrant In Another State.

Besides not having any "articulable facts" the arresting officers were not asked to stop the subject airplane and investigate, but rather were asked to "hold the plane for Alabama authorities". Moreover, nothing in the record indicates that Alabama police were the ones who were requesting that the plane be held. It appears that the communications from Alabama to Georgia came solely through FAA channels. This "hold" request cannot be construed as anything but a request for an arrest, particularly since the arresting officers were not given any information as to what was to be investigated, but only told to hold the plane. It should be noted that the Alabama police had no suspicion of any activity other than the possibility (conveyed to them by an FAA employee in Alabama) that petitioner had made an "unauthorized landing". That would be, at most, a regulatory offense. The petitioner had been stopped and questioned in Alabama, i.e. a Terry stop was effected there. It should be noted that at the hearing both Alabama and FAA authorities admitted that there was no such crime or offense as an "unauthorized landing" committed. Here the order to stop and hold the petitioner in Georgia for a non-existent regulatory offense in Alabama was an arrest order that was put into effect when petitioner's liberty was restrained and he was ordered from his aircraft at shotgun point. *Kelly vs. State*, 129 Ga. App. 131, 133(2), 198 SE2d 910 (1973). See *Whitley vs. Warden*, 401 U.S. 560 (1971).

CONCLUSION

In the decision by the Court of Appeals of Georgia in this case, Presiding Judge Quillian wrote an excellent dissenting opinion [with concurrence by the only other appellate Judge hearing the oral argument] from which we quote an excerpt:

> "In summary, the instant case follows one mistake upon another. First, there was no "founded suspicion" or "specific articulable facts" to base a Terry-type stop — only "suspicion." Second, only the FAA official had any "suspicion". Third, that "suspicion" was not communicated to the [arresting Fulton County, Georgia] police. Fourth, a spurious offense that never existed was communicated to the [Alabama] police to make a "Terry-type" stop. Fifth, a "Terry-type" stop was made in Anniston, Alabama, and the police were given the reasons for their presence at that airport. See Adams v. Williams, 407 U.S. 143, 146 (92 SC 1921, 32 LE2d 612). Sixth, the attempt to stop defendant from leaving the Anniston airport was based on the non-existing offense of "unauthorized landing". Seventh, there is no evidence that Alabama police authorities issued the "stop" and "hold" order. FAA officials in Alabama communicated with Georgia FAA officials. Eighth, Fulton County officials were directed to arrest the defendant — not to make a Terry-type stop. Ninth, regardless of directions from "Alabama authorities", the defendant was arrested at that point in time where the police blocked his

path with police cars, stopped his airplane, exhibited two shotguns and ordered him to leave the airplane. Henry vs. United States, 361 U.S. 98, 103, supra; Beck v. Ohio, 379 U.S. 89, 91 (85 SC 223, 13 LE2d 142); Terry v. Ohio, 392 U.S. 1 (88 SC 1868, 20 LE2d 889); *Clements v. State*, 226 Ga. 66, 67, supra; *Strong v. State*, 231 Ga. 514, 518, supra. The arrest being without probable cause, the search that followed was illegal.

I would reverse." [Matter in brackets added for clarity.]

It is respectfully submitted that this Court's Writ of Certiorari should be granted so that the extremely important issues may be determined as to when and under what circumstances an investigatory stop is permissible and so as to give guidelines to the lower courts as to the distinction between an arrest and a Terry type investigatory stop. Stopping an airplane by physically blocking the main taxiway of a very busy airport for no known reason other than having been asked to "hold" the aircraft is a far cry from this Court's initial reasoning in *Terry v. Ohio*, 392 U.S. 1. If careful standards are not established, an apparent erosion of the Fourth Amendment will certainly follow, for it is very likely (as the case at bar graphically illustrates) that the police will utilize Terry stops as their guise for warrantless searches and seizures. Practically anyone can be stopped for "an investigation" and *suspicion* is far less subject to judicial analysis than is probable cause.

This case brings into focus the necessity of establishing solid grounds and limitations for "investigatory stops". To be free from unreasonable searches and seizures is a cornerstone of our free society. Yet, unreasonable searches and seizures are being effected and now judicially upheld by the lower courts on the premise that they were only investigatory stops. This Court must set out the necessary guidelines for the courts below.

PRAYER

WHEREFORE, the petitioner prays that this Court issue the Writ of Certiorari to the Court of Appeals of Georgia.

Respectfully submitted,

/s/ FLOYD E. SIEFFERMAN, JR.

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December 5, 1977

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the above and foregoing Petition have this date been served upon opposing counsel of record by placing the same in the United States mail, postage prepaid and properly addressed.

December 5, 1977.

/s/ FLOYD E. SIEFFERMAN, JR.

FLOYD E. SIEFFERMAN, JR.

APPENDIX A

ORDER DENYING
DEFENDANT'S MOTION TO SUPPRESS

In the Superior Court of Fulton County
State of Georgia

THE STATE OF GEORGIA

versus Case No. A-32152

CALVIN CHRISTOPHER FRANKLIN

The Defendant's Motion to Suppress coming on regularly to be heard by the Court, after the introduction of evidence and argument of counsel thereon, it is hereby considered, ordered and adjudged that the same be and it is hereby denied.

This 10th day of November, 1976.

/s/ JOEL J. FRYER
JOEL J. FRYER, JUDGE
FULTON SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

CERTIFICATE FOR IMMEDIATE REVIEW

In The Superior Court of Fulton County
State of Georgia

THE STATE OF GEORGIA

versus Case No. A-32152

CALVIN CHRISTOPHER FRANKLIN

The undersigned trial judge hereby certifies within 10 days of the entry of his Order Overruling the Defendant's Motion to Suppress, said Order being dated November 10, 1976 and entered November 10, 1976, that such Order of the Court overruling Defendant's Motion to Suppress is of such importance to the case that immediate review thereof should be had by the Court of Appeals or Supreme Court of the State of Georgia.

This 10th day of November, 1976.

/s/ JOEL J. FRYER
JOEL J. FRYER, JUDGE
FULTON SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

APPENDIX B

In the Court of Appeals of Georgia

CALVIN C. FRANKLIN,
Appellant,

versus Case No. 53600

THE STATE OF GEORGIA,
Appellee.

BANKE, Judge.

The defendant was indicted for violation of the Georgia Controlled Substances Act after being found in possession of nearly three thousand pounds of marijuana The defendant moved to suppress the evidence as the fruit of an illegal arrest. He now appeals from the trial court's dismissal of his motion to suppress.

The defendant was the pilot of a plane which was importing marijuana into the United States. The plane became lost in bad weather and landed at Anniston, Alabama. Before leaving the Anniston airport, the defendant aroused the authorities' suspicion as to the nature of his cargo, and local police attempted unsuccessfully to stop him before he hastily returned to the skies, bound for Atlanta.

Georgia authorities were notified of the plane's approach, and a radio call went out to Fulton County police officers near the Charlie Brown Airport to hold the plane for authorities in Alabama.

Police officers arrived at the airport moments before the defendant's plane landed, blocked the taxiway, and, armed with shotguns, awaited the defendant's arrival When the defendant landed and neared their cars, he was ordered to get out of the plane. While he was doing so, officers saw the marijuana inside the plane and, according to their version of the facts, arrested the defendant at that time.

The defendant contends that when his vehicle's motion was blocked by police cars and he was accosted by officers armed with shotguns an arrest had already occurred. It is the state's contention that the defendant was not arrested until *after* the officers saw his cargo and that the armed blockage of the taxiway amounted merely

to an "investigatory stop," as allowed by Terry v. Ohio, 392 U. S. 1 (1968). Because probable cause for an arrest did not exist until the marijuana was actually spotted inside the plane, we must determine whether sufficient evidence existed for a determination by the trial judge that the defendant's initial confrontation with the police was in the context of a Terry stop.

1. The defendant landed in Anniston in a World War II vintage aircraft of a type known to be regularly used in drug trafficking. He landed without contacting the control tower, as is customary, and drove his aircraft much faster than is normal on the ramp. He refused to disembark from the plane when asked to do so by Anniston police and took off rapidly, without going through the customary aircraft pre-flight checklist. Based on these observations, Anniston police had an articulable suspicion that contraband was present in the aircraft and thus had the right to detain the defendant for questioning under Terry.

The defendant's plane was followed on radar from Anniston to Atlanta. As Fulton County policemen were approaching Charlie Brown Airport, they were notified by radio that the aircraft had dropped off radar at Hartsfield Airport and appeared to have landed. An officer arrived at the Charlie Brown Airport to see a plane make a low sweep without setting down. There is evidence from which the trial judge could find that the defendant's aircraft was sufficiently determined by Fulton County police to be that which departed from Anniston. Because Anniston officials had sufficient cause to stop the plane under Terry, Fulton County police who were notified by radio to hold the plane for Alabama authorities also had sufficient reason to effect a Terry stop. *Silas v. State*, 133 Ga. App. 560 (1) (211 SE2d 609) (1974); *Quinn v. State*, 132 Ga. App. 395 (1) (208 SE2d 263) (1974).

2. Time of arrest is a question of fact which depends upon an evaluation of the testimony by the trial judge. Rios v. United States, 364 U. S. 253, 262 (1960). There is evidence to support the trial judge's finding that an arrest did not occur until the police saw marijuana in plain view. "Factual and credibility determinations of this sort made by a trial judge after a suppression hearing must be

accepted by appellate courts unless such determinations are clearly erroneous. See Lego v. Twomey, 404 U. S. 477 (92 SC 619, 30 LE2d 618) (1972), and United States v. Watson, 469 F2d 362 (5th Cir. 1972)." *Johnson v. State*, 233 Ga. 58 (209 SE2d 629) (1974).

Blocking the plane with police cars was a reasonable manner of stopping it under the circumstances, considering the possibility of flight by the defendant in a highly mobile aircraft. An investigatory stop is not automatically an arrest simply because an officer is armed with a shotgun. United States v. Worthington, 544 F2d 1275 (5th Cir. 1977); United States v. Maslanka, 501 F2d 208, 213, n. 10 (5th Cir. 1974). It is often necessary for the police to approach a person with a drawn weapon in a suspiciously dangerous situation in order to protect the physical well-being of both police officers and the public. In fact, in a situation very similar to that sub judice, the United States Court of Appeals for the Fifth Circuit recently held that officers acted reasonably in stopping a pilot suspected of transporting marijuana by blocking his plane and ordering him at riflepoint to disembark. United States v. Worthington, supra. The officers' actions in the case at bar in merely holding shotguns is certainly less offensive than in Worthington, where a high-powered rifle was aimed at the pilot.

The Fourth and Fourteenth Amendments to the Constitution prohibit only *unreasonable* searches and seizures. Is a seizure unreasonable simply because the police have taken the precaution to arm themselves in light of unknown danger? We are not prepared so to hold. If we were to reach a contrary result, law enforcement officers would be required to risk their lives by not drawing weapons until drawn upon, unless a hasty legal analysis convinced them that probable cause existed for an arrest.

From *Holtzendorf v. State*, 125 Ga. App. 747, 750 (188 SE2d 879) (1972), the defendant quotes, "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." With this statement we have no quarrel; the defendant was "seized" by Fulton County officers when his aircraft's passage was blocked. The

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6 *Holtzendorf* quote was taken verbatim from Terry v. Ohio, supra, another case where a defendant was seized. However, the court in Terry proceeded to hold that the seizure was not unreasonable under the Fourth Amendment — as we have done here. Therefore, the quote from *Holtzendorf* does not support the defendant's contention that he was necessarily illegally arrested.

The holding of this court in *Kelly v. State,* 129 Ga. App. 131 (2) (198 SE2d 910) (1973), does not conflict with our finding that no arrest occurred prior to discovery of the marijuana. In Division 2 of *Kelly* this court simply held that there was no "articulable suspicion" to support a Terry stop of the defendant's automobile.

Judgment affirmed. Bell, C. J., Deen, P. J., Marshall and McMurray, JJ., concur. Webb, J., concurs in the judgment only. Quillian, P. J., and Shulman, J., dissent. Smith, J., disqualified.

ARGUED MARCH 8, 1977 —DECIDED JULY 1, 1977 —
REHEARING DENIED JULY 19, 1977 —
CERT. APPLIED FOR.

Drug violation. Fulton Superior Court. Before Judge Fryer.

Chambers, Siefferman, Robinson & Cooper, Floyd E. Siefferman, Jr., for appellant.

Lewis R. Slaton, District Attorney, Joseph J. Drolet, Donald J. Stein, R. David Petersen, Assistant District Attorneys, for appellee.

QUILLIAN, Presiding Judge, dissenting.

I concur in the dissent of Judge Shulman. However, I must also dissent from the First Division of the opinion. It should be noted that the majority based its opinion on the "two-step" premise: (1) "*Anniston police* had an articulable suspicion that contraband was present in the aircraft and thus had the right to detain the defendant for questioning under Terry [Terry v. Ohio, 392 U. S. 1 (88 SC 1868, 20 LE2d 889)] . . . [thus] (2) Because Anniston officials had sufficient cause to stop the plane under Terry, Fulton County police who were notified by radio to hold the plane for Alabama authorities also had sufficient reason to effect a Terry stop." (Emphasis supplied.)

Returning to the Anniston Airport, I observe that it 7
was the FAA Traffic Control Specialist, Mr. Bennett, whose "suspicion" was aroused and not the suspicion of the police. Mr. Bennett stated: "It wasn't so much that the aircraft did not call me. However, that was a contributing factor. The main thing that really aroused my suspicions was when it was confirmed that it was this World War II-type aircraft, which we have been instructed to be on the lookout for. This was what confirmed my suspicions and led me to picking up the telephone and calling the police. The other circumstances, such as how fast he might have been going, was just a contributing factor. . ." Mr. Bennett admitted that the aircraft was not required by any rule, regulation or law, to call him.

When the police arrived at the airport they reported to the terminal and Mr. Bennett directed them to the aircraft which had parked on the "ramp underneath the only burning white light that we have." Mr. Bennett observed ". . . one figure disembarked from the aircraft and went out to the police and apparently held some conversation with them . . . the figures turned and one went back toward the aircraft . . . [Mr. Bennett] reentered the building . . . [and] heard the aircraft engine start . . . saw it taxi rapidly to the end of the runway without any run-up procedure and immediately start taking off." He also stated that it was a "pilot option" to use a "rolling takeoff" as opposed to a "dead stop" takeoff.

Officer Hudson of the Oxford Police Department of Anniston, Alabama, was the policeman who responded to the FAA call. He was asked: "What call did you receive? A. That an airplane had landed without authorization." He was directed to the airplane and testified: "When we got out of the car, a white male approached me on the passenger side of the car and asked me where he was, and I told him he was in Oxford, Alabama. At that time he said he was bound for Atlanta, Georgia from Miami, Florida, and that his instruments had been knocked out in the rainstorm earlier that night." There were three other officers at the scene. He returned to his radio to see if FAA officials were going to meet with him about the unauthorized landing. At that time the "white male" and the three police officers returned to the plane. Officer

8 Hudson then went up to the door and tried to open it and when the right engine started, moved away and shouted to the pilot to stop and get out of the plane. The other police officers were just watching. The pilot started the second engine and taxied down the taxi strip. Hudson returned to his police car, outside the fence, and drove after the airplane with his blue lights on, but "[b]y the time [they] got to a place where [they] could cross and get on that runway [which the plane was on], the plane was already off the ground." Officer Hudson now knows that FAA authorization was not required to land.

From the above facts it is evident that not only did *the police* in Anniston, Alabama, not have "articulable suspicion that contraband was present," they *had no suspicion* of any activity other than someone had made "an unauthorized landing." Further, the FAA official was the only individual who had any "suspicion," and he is correct in his terminology. It was only "suspicion." The next important step is that, in effect, *a Terry stop occurred with defendant's plane and its personnel while it was in Anniston, Alabama*, and the personnel in the airplane explained why they were there.

In sum, the Anniston police basis for their Terry-type "stop" was based solely on the "suspicion" of an FAA employee, which was not communicated to the police. "Mere unconfirmed suspicion is not the criteria upon which probable cause is based." United States v. Jackson, 533 F2d 314 (5th Cir. 1976) The police were given the spurious offense of "unauthorized landing" as a subterfuge for a Terry-type 'stop" because they did not have "specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant[ed] that intrusion." Terry v. Ohio, 392 U. S. 1 (1968 SC 1868, 20 LE2d 889). Regardless of the basis used, the Terry-type "stop" occurred and the explanation was given and the defendant departed. Any attempt by the Anniston police thereafter to stop the defendant from departing was based solely on their false belief that defendant had committed a violation of FAA origin called "unauthorized landing."

Not only was the basis of the stop false, and based upon "suspicion" alone, without any "articulable facts"

relating to drug trafficking, which was not relayed to the 9
arresting officers in Anniston or Fulton County, but the premise of the majority that the Anniston officials' right to make a Terry-type *"stop"* would be sufficient to permit the Fulton authorities to make a Terry-type "stop." ignores the fact that Fulton authorities — in effect, were directed to *make an arrest*, not a stop. Lieutenant Deariso of the Fulton County Police Department testified they were "asked to hold the plane for authorities in Alabama." When questioned as to what he intended to do, he testified: "Q. Even before you directed Mr. Franklin to get out of the cockpit of the airplane, before he even came up to a stop at the cars, you had planned to get him out and hold him, had you not sir? A Yes, sir. Q. Regardless of whatever facts you might have seen or heard or smelled or what-have-you, you were going to — you had pre-planned what you were going to do? A. We intended to try to hold him for the Alabama authorities, yes, sir."

It is crystal clear that the "hold" order of "Alabama authorities" was an arrest order and not a Terry-type "stop" that previously had been carried out. Even if — as the majority states, the Fulton County Police had authority to make a Terry-type "stop," what were they supposed to do? What questions were they going to ask? No facts had been communicated to them. This was not a request to make a Terry stop but an arrest order and the Fulton County Police carried out an illegal arrest of the defendant for a nonexistent crime of "unauthorized landing." Further, I have searched the record and can find no mention of Alabama *police* authorities making any request to arrest the defendant. What I did find was that the Anniston FAA official called Birmingham, and Birmingham in turn called the Atlanta Air Route Traffic Control office. The only evidence in the record showing communications between Alabama and Georgia was in FAA channels.

The next question is when was the arrest effected? This is the issue that particularly concerns me. What effect will this "whole court" opinion have on the law of search and seizure? The majority opinion has placed the time at when a stop becomes an arrest at a period of time too long after the original stop to justify searches formerly

thought to be legal.

It is "horn-book" law that a lawful search may be made following a lawful arrest. Our Code states that "[i]f the defendant voluntarily submits to being considered under arrest . . . the arrest is complete." Code § 27-201. Here the order to stop and hold the defendant for "Alabama authorities," was an arrest order. The arrest was complete the instant "the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be." *Caito v. State*, 130 Ga. App. 831 (1) (204 SE2d 765).

Our Supreme Court has discussed this issue as follows: "An arrest is accomplished whenever the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be. The defendant may voluntarily submit to being considered under arrest without any actual touching or show of force, and the arrest is complete. [Cits.] The mere fact that the officer testifying with regard to these occurrences stated at one place in his testimony that after he had completed the search he 'then placed him under arrest' does not alter the fact that the defendant was actually under arrest from the moment the police officers approached the automobile which he was driving and caused him to alight therefrom under the force and restraint of drawn guns," as in this case. *Clements v. State*, 226 Ga. 66, 67 (2) (172 SE2d 600); *Strong v. State*, 231 Ga. 514, 518 (202 SE2d 428); *Holtzendorf v. State*, 125 Ga. App. 747, 750 (188 SE2d 879); *Brooks v. State*, 129 Ga. App. 109, 110 (198 SE2d 892); *Flournoy v. State*, 131 Ga. App. 171 (2) (205 SE2d 473); *Hill v. State*, 140 Ga. App. 121, 124 (230 SE2d 336).

Not only has the majority opinion not followed prior decisions of this court but the result reached is contrary to the holdings of our Supreme Court in *Clements* and *Strong* supra. If these cases did not provide sufficient precedent we should have turned to the U. S. Supreme Court's holding in Henry v. United States, 361 U. S. 98 (80 SC 168, 4 LE2d 134), where federal officers investigating suspected criminal activity observed what they thought to be contraband in a car. When the car departed, "the agents followed it and finally, when they met it, waved it to a stop." Id. at 99. The court held " . . . the arrest took

place when the federal agents stopped the car." Id. at 103. Other federal courts apply the same rule. In Carpenter v. Sigler, 419 F2d 169 (8th Cir. 1969), the court held the defendant "was 'seized' when the police officers signaled him to pull to the curb by the use of their flashing red light." Id. at 171. See also United States v. Nicholas, 448 F2d 662 (8th Cir. 1971).

In this connection the U. S. Supreme Court has held that "[t]he Fourth Amendment [prohibition against unreasonable searches and seizures] applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." United States v. Brignoni-Ponce, 422 U. S. 873 (95 SC [illegible] LE2d 607). Thus whether we categorize this stop as a "seizure" or an "arrest" it is immaterial if probable cause is lacking.

If we assume that the request to "hold" the defendant was relayed by Alabama police authorities, the U. S. Supreme Court dealt with a similar situation in Whiteley v. Warden, 401 U. S. 560 (91 SC 1031, 28 LE2d 306), wherein a sheriff, acting on a tip from an informer, made out a complaint against the defendant and another person charging them with burglary. A police radio bulletin named and described the defendant, the car he was driving, and the amount and type of money taken. Relying on the radio bulletin, a police officer in another county made a warrantless arrest of the defendant — as was done in this case. The court concluded that the officer who received the radio bulletin was "entitled to act on the strength of the radio bulletin . . . [as] officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest. In sum, the complaint on which the warrant issued here clearly could not support a finding of probable cause by the issuing magistrate. The arresting officer was not himself possessed of any factual data tending to corroborate the

12 informer's tip that [the defendants] committed the crime. Therefore [defendant's] arrest violated his constitutional rights under the Fourth and Fourteenth Amendments; the evidence secured as an incident thereto should have been excluded from his trial." Id. at 568-569.

In essence, the court held that an arresting officer is entitled to act upon receipt of a radio bulletin, but the validity of his act depends upon the validity of the initiating officer's acts. If the initiating officer had the right to make an arrest, he could properly delegate the arresting function via the radio bulletin to a fellow police officer to make the arrest. United States v. Gaither, 527 F2d 456 458 (6) (4th Cir. 1975); United States v. Robinson, 536 F2d 1298, 1300 (9th Cir. 1976); see also *Brisbane v. State*, 233 Ga. 339, 343 (211 SE2d 294); *Phillips v. State*, 233 Ga. 800 (213 SE2d 664); *Creecy v. State*, 235 Ga. 542 (221 SE2d 17). In this case the initiating officials had no basis for issuance of an arrest order, particularly for drugs.

In summary, the instant case follows one mistake upon another. First, there was no "founded suspicion" or "specific articulable facts" to base a Terry-type stop - only "suspicion." Second, only the FAA official had any "suspicion." Third, that "suspicion" was not communicated to the police. Fourth, a spurious offense that never existed was communicated to the police to make a "Terry-type" stop. Fifth, a "Terry-type" stop was made in Anniston, Alabama, and the police were given the reasons for their presence at that airport. See Adams v. Williams, 407 U. S. 143, 146 (92 SC 1921, 32 LE2d 612). Sixth, the attempt to stop defendant from leaving the Anniston airport was based on the nonexisting offense of "unauthorized landing." Seventh, there is no evidence that Alabama police authorities issued the "stop" and "hold" order. FAA officials in Alabama communicated with Georgia FAA officials. Eighth, Fulton County officials were directed to arrest the defendant — not to make a Terry-type stop. Ninth, regardless of directions from "Alabama authorities," the defendant was arrested at that point in time where the police blocked his path with police cars, stopped his airplane, exhibited two shotguns, and ordered him to leave the airplane. Henry v. United States, 361 U. S. 98, 103, supra; Beck v. Ohio, 379

U. S. 89, 91 (85 SC 223, 13 LE2d 142); Terry v. Ohio, 392 13
U. S. 1 (88 SC 1868, 20 LE2d 889); *Clements v. State*, 226 Ga. 66, 67, supra; *Strong v. State*, 231 Ga. 514, 518, supra. The arrest being without probable cause, the search that followed was illegal.

I would reverse.

SHULMAN, Judge, dissenting.

I respectfully dissent. The point at which I must depart from the majority is the holding that appellant was not arrested until the police spotted marijuana inside the plane. In my view, the arrest occurred earlier when police blocked the taxiway and, armed with shotguns, ordered appellant to shut down his engines and leave the aircraft. As Judge Goldberg stated in his excellent dissent in United States v. Worthington, 544 F2d 1275 (5th Cir., 1977), cited by the majority in this case, ". . . when a police-citizen confrontation is accompanied by a greater degree of force and restraint directed toward the citizen than is ordinarily or necessarily associated with a policeman's request to stop and answer some questions, it becomes the type of seizure that must rest on antecedent probable cause, whether or not it is within the traditional definition of arrest. From that perspective, I conclude that the seizure here required the traditional probable cause basis." At 1282.

The majority addresses this issue by citing Worthington, supra, and United States v. Maslanka, 501 F2d 208 (5th Cir., 1974). In the first place, this court is not bound by precedent from the U. S. Court of Appeals; they are merely persuasive. Second, I am convinced that Judge Goldberg's analysis in Worthington is correct and that of the majority incorrect. Third, the question of the degree of force used was not directly addressed in the body of the opinion in Maslanka. In the footnote cited by the majority here, the court noted that the arresting officer was alone on a country road with three men he had chased at speeds around 100 mph. In addition, the court noted, he had probable cause to arrest the driver, at least for speeding, and did so prior to the discovery of marijuana.

The facts in Worthington are also much different from those here. There, agents were informed that a young man was going to transport drugs in a particular plane during a specified time period. Pursuant to that tip, several details of

which had been verified, the agents followed Worthington for more than one day, bugged his plane, and finally confronted him when both planes were forced down by bad weather. In the instant case, the arresting officers knew nothing about appellee's activities, just that Alabama officials wanted him held. They saw a plane land, blocked its movement completely and confronted appellant with the threat of deadly force for the avowed purpose of "holding him for Alabama." I cannot accept that this procedure is consistent with a Terry investigative stop. With no information as to why they were acting, police officers armed with shotguns took custody of the appellant to "hold" him. That was an arrest and, since it preceded the discovery of the contraband, was not based on probable cause and was, therefore, illegal, requiring the suppression of the evidence seized. While the hands of the police should not be tied under clearly definable circumstances, reasonable and justifiable limitations should be applied.

I would reverse.

APPENDIX C

EXTRACTS FROM THE TRANSCRIPT OF EVIDENCE

CROSS-EXAMINATION OF LT. ROBERT DEARISO

BY MR. SIEFFERMAN:

* * *

Q For what reason did you block the taxiway at Charlie Brown Airport as this airplane was taxiing up the taxiway?

A We was requested to hold the plane for the Alabama authorities, sir.

Q For what reason?

A I don't know, sir.

Q So you didn't know why you were doing it except that you were told to hold the airplane?

A That's right, sir. We were honoring a request from Alabama authorities to hold the plane.

Q You didn't know if you were asked to hold it because maybe some occupant of the airplane had a sick child in Alabama or what?

A No, sir, I didn't. (Tr. 41-42)

* * *

RE-CROSS EXAMINATION OF LT. ROBERT DEARISO

BY MR. SIEFFERMAN:

Q All right. Even before you direct Mr. Franklin to get out of the cockpit of the airplane, before he even came up to a stop at the cars, you had planned to get him out and hold him, had you not, sir?

A Yes, sir.

Q Regardless of whatever facts you might have seen or heard or smelled or what-have-you, you were going to — you had pre-planned what you were going to do?

A We intended to try to hold him for the Alabama authorities, yes, sir. (Tr. 49)

* * *

THE COURT: . . . I don't think there was enough information to issue a warrant for the Atlanta Police or for the Anniston, Alabama Police. (Tr. 64)